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No. 94-2117

In the Supreme Court of the United States

OCTOBER TERM, 1995

DEL KIDD AND JUDY KIDD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Civil Service Reform Act of 1978 (CSRA) precludes federal courts from granting equitable relief for constitutional violations in federal employment.

2. Whether the CSRA violates the separation of powers doctrine because it does not provide for judicial review of certain conclusions by the Office of Special Counsel that charges filed by federal employees are without merit.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Astoria Fed. Savings & Loan Ass'n v. *Solimino*, 501 U.S. 104 (1991)	12
Bartel v. *FAA*, 725 F.2d 1403 (D.C. Cir. 1984)	10
Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)	5
Broadway v. *Block*, 694 F.2d 979 (5th Cir. 1982)	9
Bush v. *Lucas*, 462 U.S. 367 (1983)	8, 15
Crowell v. *Benson*, 285 U.S. 22 (1932)	13, 14
Hubbard v. *EPA*, 809 F.2d 1 (D.C. Cir. 1986)	10
Kidd v. *Department of Interior*, No. 91-3546 (Fed. Cir. July 12, 1993), cert. denied, 114 S. Ct. 1060 (1994)	4
Kidd v. *United States*, Nos. 92-15657 & 92-16455 (9th Cir. Oct. 7, 1993), cert. denied, 114 S. Ct. 1643 (1994)	5
Kremer v. *Chemical Construction Corp.*, 456 U.S. 461 (1982)	12
Lombardi v. *Small Business Admin.*, 889 F.2d 959 (10th Cir. 1989)	9
Pinar v. *Dole*, 747 F.2d 899 (4th Cir. 1984). cert. denied, 471 U.S. 1016 (1985)	9
Rivera v. *United States*, 924 F.2d 948 (9th Cir. 1991)	9
Saul v. *United States*, 928 F.2d 829 (9th Cir. 1991)	7, 9
Spagnola v. *Mathis*, 859 F.2d 223 (D.C. Cir. 1988)	10
Stephens v. *Department of Health & Human Servs.*, 901 F.2d 1571 (11th Cir.), cert. denied, 498 U.S. 998 (1990)	9

Cases—Continued: Page

Thomas v. *Union Carbide Agricultural Prods. Co.*, 473 U.S. 568 (1985) 14
United States v. *Fausto*, 484 U.S. 439 (1988) 2, 8, 9
United States v. *Sperry Corp.*, 493 U.S. 52 (1989) 12
United States v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966) 11
Veit v. *Heckler*, 746 F.2d 508 (9th Cir. 1984) 8, 9
Williams v. *IRS*, 745 F.2d 702 (D.C. Cir. 1984) 10

Constitution and statutes:

U.S. Const.:
Art. III 14, 15
Amend. I 5, 6, 8, 10, 11
Amend. V (Due Process Clause) 12
Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 5
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 2
5 U.S.C. 2302 2
5 U.S.C. 2302(b)(8) 3
5 U.S.C. 7512 2
5 U.S.C. 7513(d) 2
5 U.S.C. 7703 2
5 U.S.C. 7703(b)(1) 3, 5
Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* 5, 10
Longshoremen's and Harbor Workers' Compensation Act of 1927, ch. 509, 44 Stat. 1424 13
Privacy Act of 1974, 5 U.S.C. 552a(g)(1)(C) 6
Whistleblower Protection Act of 1989, Pub. L. No. 101-12, § 3(a)(13), 103 Stat. 21 2-3
5 U.S.C. 1214(a)(1)(A) 2
5 U.S.C. 1214(a)(3) 3
5 U.S.C. 1221 3
5 U.S.C. 1221(e) (Supp. V 1993) 4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A11) is unpublished, but the judgment is noted at 59 F.3d 175 (Table). The orders of the district court (Pet. App. A13-A18, A19-A27) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1995. A petition for rehearing was denied on March 29, 1995. Pet. App. A1. The petition for a writ of certiorari was filed on June 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Employment with the federal government is governed by the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111. In enacting the CSRA, Congress comprehensively overhauled the civil service system and replaced a "patchwork system" of statutes and rules governing review of federal personnel actions with "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *United States* v. *Fausto*, 484 U.S. 439, 445 (1988).

In the CSRA, Congress created several categories of employees and personnel actions and provided different avenues of administrative and judicial review for each category. If a federal employee is the subject of a serious adverse personnel action, such as removal or suspension for more than 14 days (see 5 U.S.C. 7512), the employee may (with certain exceptions) appeal the action to the Merit Systems Protection Board (MSPB) (5 U.S.C. 7513(d)) and thereafter seek review in the United States Court of Appeals for the Federal Circuit (5 U.S.C. 7703). If an employee is suspended for 14 days or less, the employee may not appeal directly to the MSPB. However, if the employee believes that such a minor personnel action was the result of a "prohibited personnel practice" (see 5 U.S.C. 2302), the employee may petition the Office of Special Counsel (OSC) for relief. See 5 U.S.C. 1214(a)(1)(A).

OSC has jurisdiction to investigate allegations that personnel actions were taken in violation of the Whistleblower Protection Act of 1989, Pub. L. No.

101-12, § 3(a)(13), 103 Stat. 21, which prohibits reprisals for federal employees' lawful disclosure of information relating to violations of law, mismanagement, and abuse of authority. See 5 U.S.C. 2302(b)(8). If OSC determines that a personnel action was not taken in violation of the Whistleblower Protection Act, the employee may obtain further review of that determination by requesting "corrective action" from the MSPB. See 5 U.S.C. 1214(a)(3), 1221. The employee may also seek judicial review of the MSPB's decision in the Federal Circuit. See 5 U.S.C. 7703(b)(1).

2. Petitioner Del Kidd is an employee of the Bureau of Reclamation, an agency of the Department of the Interior. Pet. 2.[1] Petitioner filed several grievances with the agency concerning, among other things, his transfer from the agency's Yuma, Arizona, office to its Boulder City, Nevada, office, and his suspension for 14 days without pay for accusing his superiors of being involved in a fire at his house. See Complaint ¶¶ 5, 14-16, 36. In 1989, petitioner also filed complaints with OSC concerning the same personnel actions. Pet. 4-7. Petitioner's first complaint to OSC charged that his 14-day suspension from employment was motivated by age discrimination and retaliation for whistleblowing. Pet. App. A33. In the second complaint, petitioner charged that his superiors had transferred him to Nevada to retaliate for his filing a grievance and to force him to retire. *Id.* at A31.

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[1] Although Judy Kidd is also named as a petitioner, it is clear from the petition and the complaint that this case arises entirely out of Del Kidd's employment history. Therefore, we refer to Del Kidd as "petitioner."

As to the age discrimination claim, OSC informed petitioner that its general policy is not to duplicate other agency equal employment opportunity (EEO) procedures, and OSC referred petitioner to the agency's EEO process for that claim. Pet. App. A33-A34. After an investigation of petitioner's other complaints, OSC found insufficient evidence to substantiate the charges. *Id.* at A28-A37. In particular, OSC concluded that petitioner had been suspended from employment, not for making protected disclosures of information, but "due to repeated statements [petitioner] made concerning [his] former supervisors starting a fire at [his] home." *Id.* at A34.

Petitioner then sought administrative and judicial review of OSC's decision not to pursue his various claims. First, petitioner sought review by the MSPB, under the Whistleblower Protection Act, 5 U.S.C. 1221(e) (Supp. V 1993), of OSC's conclusion that he had not suffered retaliation for whistleblowing. The MSPB ruled that petitioner was not entitled to relief under the Whistleblower Protection Act because none of his allegations involved disclosures protected under that Act. The court of appeals affirmed. *Kidd* v. *Department of Interior*, No. 91-3546 (Fed. Cir. July 12, 1993), cert. denied, 114 S. Ct. 1060 (1994).

Petitioner next filed suit against the United States and various agencies and individuals in district court, seeking damages for alleged constitutional and common law torts of defamation, negligence, deprivation of due process, intentional infliction of mental distress, abuse of authority, and civil conspiracy arising from his employment and the handling of his grievances. The district court dismissed his complaint, and the court of appeals affirmed, concluding that the

CSRA precluded all of petitioner's claims brought under the Federal Tort Claims Act and *Bivens*.[2] *Kidd* v. *United States*, Nos. 92-15657 & 92-16455 (9th Cir. Oct. 7, 1993), cert. denied, 114 S. Ct. 1643 (1994).

Finally, petitioner filed this action in district court, alleging that the United States and its agencies had violated his due process, equal protection, privacy, and First Amendment rights. Pet. 7. Petitioner requested that the court "vacate specific decisions made by the Bureau of Reclamation, Department of Interior, Office of Hearings and Appeals, Office of Special Counsel and Merit System Protection Board" and expunge all evidence of personnel actions taken against him relating to his various grievances. Complaint ¶ 25. The complaint also requested declaratory relief under the Administrative Procedure Act (APA), a ruling whether the CSRA's remedial system protects the constitutional rights of federal employees, and a decision whether the CSRA comports with the Constitution. See Pet. 3.

3. The district court dismissed petitioner's claims in two orders. The court first concluded that it lacked jurisdiction to hear petitioner's claim that his due process and First Amendment rights were violated when the MSPB improperly denied his whistleblower claim. The court noted that, under 5 U.S.C. 7703(b)(1), the Federal Circuit has exclusive jurisdiction to review final decisions of the MSPB, which had heard petitioner's whistleblower claim. Pet. App. A20-A21. The court further held that, although it could not review the merits of OSC's determination

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[2] *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

on petitioner's whistleblower claim, it could review the case to determine whether OSC had "discharged its duty to investigate" the claim. *Id.* at A21-A22. The court subsequently ruled that OSC had fully discharged its duty to investigate. *Id.* at A17.

As to petitioner's remaining constitutional claims of deprivation of due process, equal protection, First Amendment rights, and the right to privacy, the court observed, "it would appear that the CSRA would preclude review based on [petitioner's] claims for equitable relief." Pet. App. A23. Nevertheless, the court stated that it would "address the constitutional claims to determine if they can survive dismissal," *ibid.*, and found them all without merit.

The court first noted that the complaint "allege[s] some sort of constitutional claim relating to privacy [but] * * * does not set out specifically what acts * * * constituted such a violation." Pet. App. A23. The court interpreted the complaint as raising a claim under the Privacy Act of 1974, 5 U.S.C. 552a(g)(1)(C). The court concluded that the CSRA precluded it from affording any relief for a violation of the Privacy Act, because a "review of any alleged violation of the Privacy Act regarding an administrative decision would necessitate a review of the underlying personnel decisions," which would " 'open the back door to judicial review [of] perhaps an overwhelming number' of CSRA claims." Pet. App. A24.

The court further concluded that it had no jurisdiction to review petitioner's First Amendment claim based on his termination, because that claim merely duplicated the whistleblowing claim that had been presented to the MSPB and the Federal Circuit. Pet. App. A25-A26. The court also noted that petitioner's

due process claims "would have been brought before the MSPB and thus would now be properly before the [Federal Circuit]" (*id.* at A26), and that those complaints had been brought to the attention of OSC, which had discharged its statutory duty to investigate and had found no constitutional violations (*ibid.*).

Finally, the court concluded that petitioner's equal protection claim lacked merit. The court observed that the CSRA does not afford judicial review to employees who suffer only a minor adverse personnel action, and who do not contend that the personnel action was based on a prohibited personnel practice, such as retaliation for whistleblowing. The court concluded, however, that the distinctions in the review scheme established by Congress in the CSRA are rationally related to legitimate governmental interests of avoiding escalation in court costs and overcrowded court dockets. Pet. App. A24-A25.

4. The court of appeals affirmed in an unpublished decision. Pet. App. A2-A11. The court held that the CSRA precludes district courts from affording injunctive relief for alleged deprivations of constitutional rights. *Id.* at A5-A6. The court relied on its prior decision in *Saul* v. *United States*, 928 F.2d 829, 843 (9th Cir. 1991), where it stated that "the CSRA's elaborate remedies show that judicial interference in federal employment is disfavored," and that "[t]he CSRA precludes [a plaintiff] from seeking injunctive relief for his asserted constitutional injury just as it precludes him from bringing a *Bivens* action for damages." Pet. App. A5-A6.

The court also affirmed the district court's dismissal of petitioner's complaint insofar as it sought

judicial review of OSC's termination of its investigation into his charge of whistleblower retaliation. Pet. App. A7-A8. The court reaffirmed its earlier statement, in *Veit* v. *Heckler*, 746 F.2d 508, 510-511 (9th Cir. 1984), that judicial review of OSC's actions is "limited, at most, to insuring compliance with the statutory requirement that the OSC performed an adequate inquiry." Pet. App. A7.

ARGUMENT

1. a. This Court has observed on several occasions that "[t]he CSRA established a comprehensive system for reviewing personnel action taken against federal employees." *Fausto*, 484 U.S. at 455; see also *Bush* v. *Lucas*, 462 U.S. 367, 368 (1983). The CSRA reflects Congress's judgment that, as a matter of "federal personnel policy," some remedies should be available to some classes of employees for some violations of law, but that other remedies should be precluded. See *id.* at 380-381. Thus, the question in this case, as it was in *Bush*, where the Court declined to fashion a damages remedy under *Bivens* for First Amendment violations in the federal employment context, is "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue." 462 U.S. at 388.

Many of the factors that led the Court to decline to fashion a nonstatutory damages remedy for federal employees also apply to petitioner's request for injunctive relief. Petitioner seeks, in effect, to have the courts set aside his employer's personnel decision (the transfer to Nevada) and imposition of a disciplin-

ary sanction (the 14-day suspension for accusing his supervisors of involvement with the fire at his house). In such circumstances, a remedy of injunctive relief would seriously disrupt the carefully designed system established by Congress that balances "the legitimate interests of * * * federal employees with the needs of sound and efficient administration." *Fausto*, 484 U.S. at 445. "The CSRA's elaborate remedies show that judicial interference in federal employment is disfavored, whether the employee requests damages or injunctive relief." *Saul*, 928 F.2d at 843.

The Ninth Circuit's conclusion that the CSRA precludes nonstatutory injunctive relief for constitutional violations in federal employment is consistent with the decisions of most of the other courts of appeals that have addressed the issue. See *Stephens* v. *Department of Health & Human Servs.*, 901 F.2d 1571, 1576 (11th Cir.), cert. denied, 498 U.S. 998 (1990); *Lombardi* v. *Small Business Admin.*, 889 F.2d 959, 961-962 (10th Cir. 1989); *Pinar* v. *Dole*, 747 F.2d 899, 909-912 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); see also *Broadway* v. *Block*, 694 F.2d 979, 986 (5th Cir. 1982). The courts of appeals have recognized that "the comprehensive nature of the procedures and remedies provided by the CSRA indicates a clear congressional intent to permit federal court review as provided in the CSRA or not at all." *Veit*, 746 F.2d at 511. "[I]n enacting the [CSRA] Congress meant to limit the remedies of federal employees bringing claims closely intertwined with their conditions of employment to those remedies provided in the statute." *Rivera* v. *United States*, 924 F.2d 948, 951 (9th Cir. 1991) (holding that CSRA also precludes

relief under Federal Tort Claims Act in action based on federal employment).

b. The District of Columbia Circuit has stated that the courts are not precluded "altogether" from granting injunctive relief to federal employees for constitutional violations. *Spagnola* v. *Mathis*, 859 F.2d 223, 229 (D.C. Cir. 1988) (en banc) (per curiam). In *Spagnola*, the court held that the CSRA preempted claims seeking damages for constitutional violations in the federal employment context, but it also stated that it had repeatedly "affirmed the right of civil servants to seek equitable relief against their supervisors, and the agency itself, in vindication of their constitutional rights." *Id.* at 230; see, *e.g.*, *Hubbard* v. *EPA*, 809 F.2d 1, 11-12 (D.C. Cir. 1986); *Williams* v. *IRS*, 745 F.2d 702, 705 (D.C. Cir. 1984) (per curiam); *Bartel* v. *FAA*, 725 F.2d 1403, 1415 (D.C. Cir. 1984).

This case, however, is not an appropriate vehicle to resolve any disagreement between the D.C. Circuit and the other courts of appeals about the availability of injunctive relief in the federal employment context, because petitioner's constitutional claims are plainly without substance. As the district court pointed out (Pet. App. A23-A24), petitioner failed to make a coherent argument as to how the actions of his supervisors could have violated his constitutional right to privacy. The district court also noted, with regard to petitioner's due process claim, that petitioner had failed to allege the deprivation of any specific liberty or property interest. *Id.* at A26.

Petitioner's First Amendment claim is, as the district court recognized, Pet. App. A25-A26, in essence a reprise of his claim that his supervisors retaliated against him for whistleblowing. That claim

was presented to and rejected by the MSPB, which held that petitioner's statements were not covered by the Whistleblower Protection Act; the MSPB's ruling was upheld by the Federal Circuit. See *ibid.* Even if the district court had subject matter jurisdiction over petitioner's First Amendment claim, the claim would be precluded by principles of collateral estoppel, for the MSPB's determination that petitioner was not a whistleblower is fatal to his First Amendment allegation. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966).

In *Utah Construction*, the Court held that a factual determination by the Advisory Board of Contract Appeals as to the cause of delay in completion of a contract was binding on the parties in a subsequent suit for breach of contract brought in the Court of Claims, even though the Board did not have authority to render a decision on the specific legal claims underlying the Court of Claims suit. The Court noted that any claim relevant to the government contract "can be couched in breach of contract language," and it observed that "[t]he contractual and statutory scheme would be too easily avoided if a party could compel relitigation of a matter once decided by a mere exercise of semantics." 384 U.S. at 419. Indeed, because of the costs of repetitive litigation, the Court has "long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of

administrative bodies that have attained administrative finality. * * * Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise." *Astoria Fed. Savings & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 107-108 (1991); see also *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 484-485 & n.26 (1982).

As to petitioner's equal protection claim, which might be construed as a claim that the CSRA on its face violates the equal protection component of the Due Process Clause of the Fifth Amendment, the district court addressed that claim on the merits and correctly rejected it. The distinctions created by the CSRA "neither burden[] fundamental constitutional rights nor create[] suspect classifications, so [the] standard of review is that of rationality." *United States* v. *Sperry Corp.*, 493 U.S. 52, 65 (1989). Congress had a rational basis for affording federal employees the right to administrative and judicial review of major personnel actions (such as removal and suspension for more than 14 days), as well as minor personnel actions alleged to have been motivated by retaliation for whistleblowing, but not other, minor personnel actions. Congress could have legitimately concluded that administrative and judicial resources were appropriately dedicated to review of actions that cause a serious disruption of a federal employee's life, or that are alleged to have been motivated by reasons that are deemed particularly offensive but are also difficult to prove and therefore warrant further administrative and judicial review. Petitioner had the

benefit of that administrative and judicial review when he presented his whistleblowing claim to the MSPB and the Federal Circuit.

2. Petitioner also contends that the CSRA violates the separation of powers doctrine and the "constitutional fact" doctrine because it supposedly transfers jurisdiction over employees' constitutional claims to OSC. Pet. 7-11 & 15-18. Although petitioner recognizes that major personnel actions and actions alleged to be taken in retaliation for whistleblowing are subject to review by the MSPB and the Federal Circuit, he complains that "[t]he sole remedy available to victims of abuse of authority, violation of regulations, and mismanagement * * * is to report such violations to the OSC." Pet. 8. He argues that the CSRA's preclusion of judicial review of OSC's actions on such charges contravenes *Crowell* v. *Benson*, 285 U.S. 22 (1932).

In *Crowell*, the Court upheld a provision of the Longshoremen's and Harbor Workers' Compensation Act of 1927 that provided for workers' compensation claims to be decided by an administrative official within the United States Employees' Compensation Commission. See 285 U.S. at 42-44. The Court also stated that, "[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function," *id.* at 60, and it therefore construed the act to provide that the determination by the administrative official of the "fundamental or jurisdictional facts" was subject to *de novo* review by the courts, *id.* at 62-65.

Crowell was quite different from this case, in that it involved a statute that "displaced a traditional cause of action and affected a pre-existing relationship based on a common-law contract for hire." *Thomas* v. *Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 587 (1985). The CSRA, on the other hand, governs only the relationship between federal employees and the government, which has traditionally been subject to executive regulation and legislative discretion, not common law adjudication. *Crowell* distinguished cases involving private rights arising under the common law, in which Article III generally requires a judicial determination of issues of fact and law, from cases arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," in which "the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." 285 U.S. at 50. Thus, "the Court has long recognized that Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts. Many matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts." *Thomas*, 473 U.S. at 583 (citations omitted).

Congress therefore did not contravene Article III when it assigned administrative review of whistleblower claims to OSC and the MSPB, with judicial

review by the Federal Circuit, and assigned the duty to investigate other claims, not based on whistleblowing but alleging violations of regulations governing federal employment, to OSC. All of those claims involve "public rights" arising out of the federal employment relationship, not private, common law rights and liabilities traditionally within the purview of Article III courts. The CSRA provided petitioner with remedies within the agency, and resort to OSC. Pet. 5-7. Petitioner took advantage of those remedies, and his charges were fully reviewed by OSC. See also *Bush*, 462 U.S. at 386 (noting that "[c]onstitutional challenges to agency action [such as claims of First Amendment violations] are fully cognizable within [the CSRA] system"). The district court also considered and rejected petitioner's claim (which OSC and the MSPB may not have been able to review) that the CSRA violated principles of equal protection by denying him judicial review for certain claims. Petitioner therefore received all the judicial review to which he was entitled under Article III.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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